

MALL (MIGRATION) [2024] ARTA 843 (13 NOVEMBER 2024)

Decision and

Reasons for Decision

Applicant:	Mr Rahul Mall
Respondent:	Minister for Home Affairs
Tribunal Number:	2214780
Tribunal:	General Member A. Dronjic
Place:	Melbourne
Date:	13 November 2024
Decision:	The Tribunal sets aside the decision not to grant the applicant a Skilled Independent (Permanent) visa and substitutes a decision that the applicant's Skilled Independent (Permanent) visa application was invalid.

Statement made on 13 November 2024 at 2:53pm

CATCHWORDS

MIGRATION – Skilled Independent (Permanent) (Class SI) visa – Subclass 189 Skilled – Independent – bogus documents – education and employment documents – fraud allegations against former migration agents – natural justice not afforded – gap in studies – family illness – decision under review remitted as visa application was invalid

LEGISLATION

Administrative Review Tribunal Act 2024, s 105
Migration Act 1958, ss 5(1), 5C, 47, 57, 65, 98
Migration Regulations 1994, Schedule 2, cl 189.211; Schedule 4, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Gill v Minister for Immigration and Border Protection [2016] FCAFC 142
Maharjan v MIBP [2017] FCAFC 213
Palikhe v MIBP [2014] FCCA 1875
Salopal v MIBP [2018] FCA 1308
Singh v MIBP [2015] FCCA 2776
Singh v MIMAC [2013] FCCA 1435
Sran v MIBP [2014] FCCA 37
Sun v MIBP [2016] FCAFC 52

SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189
Trivedi v MIBP [2014] FCAFC 42

Statement of reasons

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 19 September 2022 to refuse to grant the visa applicant a Skilled Independent (Permanent) Subclass 189 visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The visa applicant applied for the visa on 28 April 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of public interest criterion (PIC) 4020(1) for the purposes of meeting cl 189.211 of Schedule 2 to the *Migration Regulations 1994* (Cth).
3. The delegate also considered whether there are compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the grant of the visa and found that the provisions for waiving the requirements of PIC 4020(1) were not met by the applicant.
4. According to the primary decision record, with his visa application the applicant provided documentary evidence of completing a Professional Year Program at Australian Technical & Management College on 25 September 2018. As a result of Departmental verification, it was revealed that the applicant was never enrolled in a Professional Year Program at that college.
5. On 5 September 2021, the applicant provided a Skilled Employment Assessment from CPA Australia dated 3 September 2021, stating that between February 2019 and August 2021, the applicant obtained work experience as an External Auditor at Vaasu Tax Services Pty Ltd. As a result of the Department's verification process, it was revealed that CPA Australia held no record of undertaking or providing a skilled employment assessment for Mr Rahul Mall.
6. The applicant sought review of the delegate's decision on 7 October 2022 and with his application provided a copy of the primary decision record.
7. On 7 October 2024, the Tribunal wrote to the applicant advising him that it had considered the material before it and was unable to make a favourable decision on this material alone, and invited the applicant to attend a hearing on 7 November 2024.
8. On 6 November 2024, the applicant submitted his written statement and documentary evidence in support of his application.
9. **History of proceeding**
10. In March 2020, the applicant approached a migration agent business trading under the name of VR Intelligence, seeking advice and immigration assistance from Ms Rashika and her husband Mr Vibhor. Both represented themselves to the applicant as migration agents.
11. Believing that both Ms Rashika and Mr Vibhor were migration agents, the applicant engaged them (VR Intelligence) to prepare and lodge his application for a Subclass 189 visa. In his evidence, the applicant claims that he was not aware that VR Intelligence were not listed as his migration agent in the visa application form. He agreed to pay \$10,000 for their professional services according to the payment plan presented to him by Ms Rashika. Of that amount, he claims to have paid \$6,000.

12. The applicant stated that he did not check the answers provided in the application form, which was completed and electronically lodged by VR Intelligence. Nor did he check documentary evidence submitted with the application to the Department. He relied on their professional advice, believing that both Ms Rashika and Mr Vibhor were migration agents.
13. The email address provided on the application form was omganapataye2@gmail.com which meant email correspondence was sent directly to VR Intelligence. The applicant gave evidence that Ms Rashika informed him by email that the visa application was lodged with the Department. He further stated that the Department's bridging visa grant letter was forwarded to him by VR Intelligence.
14. The applicant travelled to India between 23 August 2022 and 21 September 2022. Upon arriving at Melbourne airport on 21 September 2022, he was informed by an immigration officer that his application for a Subclass 189 visa was refused by the Department. The applicant contacted Mr Vibhor and was reassured that he would fix the problem by lodging a review application with the Tribunal. The explanation for the visa refusal provided to the applicant by Mr Vibhor was that Ms Rashika simply failed to provide some documents to the Department at the time of visa application. Based on that explanation, the applicant agreed to continue to engage VR Intelligence in relation to the Tribunal review application.
15. Once again, the email address provided on the review application form was omganapataye2@gmail.com, which meant email correspondence was sent directly to VR Intelligence and not to the applicant. The applicant paid the Tribunal application fees but not VR Intelligence's professional fees. He did not receive the hearing invitation letter and only became aware of the scheduled hearing upon receiving an SMS reminder message from the Tribunal on 30 October 2024. The applicant contacted the Tribunal on 4 November 2024 and updated the contact details to be his own personal email address and phone number.
16. Soon after lodgement of the review application, the applicant requested a copy of the primary decision record from VR Intelligence. It was only then that he realised that with his visa application, VR Intelligence submitted documents related to a Professional Year Program from Australian Technical & Management College that he never attended.
17. Similarly, he discovered that VR Intelligence submitted the Skilled Employment Assessment from CPA Australia dated 3 September 2021, concerning the assessment of his work experience as an External Auditor at Vaasu Tax Services Pty Ltd between February 2019 and August 2021. The applicant stated that he never worked at this business, nor had he ever heard of this business before receiving a copy of the primary decision.
18. The applicant gave evidence that he was unaware that the Department issued Invitation to Comment letters on 28 July 2021 and 28 February 2022 because those letters were sent to VR Intelligence's email address, and they failed to inform him of receiving them.
19. When the Tribunal presented the applicant with a copy of the 'response to invitation to comment letter' submitted to the Department on 25 August 2021 by VR Intelligence, the applicant stated that he did not write that letter and that he never saw it before.
20. For the following reasons, the Tribunal decided that the Department's decision of 19 September 2022 be set aside and substituted with the decision that the applicant's Skilled Independent (Permanent) visa application was invalid.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in this review is whether the applicant meets PIC 4020 as required by cl 189.211 for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
22. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B).

Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?

23. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
24. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
25. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
26. When considering whether a document is a 'bogus document', it is necessary to address the elements of the definition in s 5 of the Act. According to the definition, a 'bogus document' in relation to a person, means a document that the Minister reasonably suspects is a document that:
- a. purports to have been, but was not, issued in respect of the person; or
 - b. is counterfeit or has been altered by a person who does not have authority to do so; or

- c. was obtained because of a false or misleading statement, whether or not made knowingly.

27. What amounts to a 'bogus document' is determined separately from the overall consideration of PIC 4020¹ and is a question of fact for the Tribunal to determine.² The Federal Court has commented that the Tribunal should first determine whether a document is a 'bogus document' as defined in s 5(1) of the Act, and then go on to consider whether there is no evidence that an applicant has given or caused it to be given to a party listed in PIC 4020(1).³
28. To meet the definition of 'bogus document', there need only be a 'reasonable suspicion' of a document being bogus, not probative evidence. The relevant test is whether the Tribunal reasonably suspects the document is a document that falls within one of the three limbs of s 5(1) of the Act.
29. A reasonable suspicion in this context does not require the evidence to be such that the reasonable suspicion be of facts established on the balance of probabilities. Rather, there must be objective circumstances upon which the reasonable suspicion of the decision maker is founded, where those objective circumstances are not mere surmise or conjecture.⁴
30. The applicant does not dispute that documents submitted to the Department with his visa application, and in particular the Professional Year Program academic transcript, Statement of Achievement from Australian Technical & Management College, Certificate of Completion dated 25 September 2018 and Skilled Employment Assessment from CPA Australia dated 3 September 2021, are all bogus documents within the meaning of paragraphs (b) and (c) of the definition of 'bogus document' in s 5(1) of the Act.
31. Based on the evidence before it, including the applicant's oral evidence, the Tribunal accepts that in March 2020 the applicant approached VR Intelligence on his own volition for advice and assistance in preparing and lodging his application for a Subclass 189 visa.
32. The applicant also willingly paid VR Intelligence \$6,000 in consideration for their services and provided them with necessary instructions and supporting documentary evidence required for the lodgement of the visa application. By giving these instructions, he provided sufficient information to VR Intelligence to enable them to lodge the visa application.
33. In his evidence, the applicant stated that he did not check the answers provided in the application form, which was completed and lodged by VR Intelligence. The Tribunal notes that s 98 of the Act provides that an applicant who does not fill in his or her own application form will be taken to have done so if he or she causes it to be filled in, or if it is otherwise filled in on his or her behalf.
34. Accordingly, the Tribunal finds that the applicant engaged VR Intelligence to assist him to prepare and lodge an application for a Subclass 189 visa, and that the payment of a fee for this service resulted in a retainer between the parties. Based on the evidence before it, the Tribunal finds that the applicant had authorised the making of the visa application by giving the authority to VR Intelligence to do so.
35. In *Sran v MIBP*⁵ the Court found that an agency agreement for the purpose of lodging a visa application was established, in circumstances where the applicant instructed the agent to

¹ *Singh v MIMAC* [2013] FCCA 1435 at [24].

² *Palikhe v MIBP* [2014] FCCA 1875 at [30]–[32] and [37]–[40].

³ *Salopal v MIBP* [2018] FCA 1308 at [88].

⁴ *Sun v MIBP* [2016] FCAFC 52.

⁵ *Sran v MIBP* [2014] FCCA 37.

make an application on his behalf, a fee was discussed, and the applicant was aware the application was to be made. It follows, that, if the applicant had not authorised VR Intelligence to lodge the visa application, it is unlikely that bogus documents would have been submitted to the Department.

36. Even where an applicant did not fill out an application form or physically give the bogus documents, he may be found to have caused a bogus document to be given to the Tribunal, and thus not to have complied with PIC 4020, despite allegations of fraud by his representative or a third party.⁶

37. *Fraud committed by VR Intelligence*

38. In the case of fraud committed by a person purporting to be a registered migration agent (as the applicant claims to have occurred in the present matter) it may not be open to the Tribunal to find that a document or information was given or caused to be given by an applicant.
39. The applicant claims, and the Tribunal accepts, that the following fraudulent actions were committed by VR Intelligence:
- Both Ms Rashika and Mr Vibhor of VR Intelligence represented themselves to be migration agents when in fact they were not;
 - The applicant was not aware that VR Intelligence were not listed as the applicant's agent on the Subclass 189 visa application form;
 - They created and used email addresses in the visa application and the review application. The email address for correspondence in these applications was not one ever used by the applicant;
 - With the visa application, VR Intelligence, without the applicant's knowledge or instructions, submitted bogus documents to the Department;
 - The applicant never received the Department's letters of 28 July 2021 and 28 February 2022 inviting him to comment on adverse information as the email address used for this correspondence belongs to VR Intelligence and not the applicant.
40. Based on the evidence before it, the Tribunal finds that VR Intelligence committed serious fraud not just on the applicant but the Department. There is no evidence before the Tribunal indicating that the applicant was in any way complicit in the fraudulent conduct carried out by VR Intelligence or indifferent as to whether VR Intelligence engaged in the fraudulent conduct. The Tribunal is satisfied that the applicant acted reasonably in the given circumstances as he placed trust in his agent.
41. Based on the evidence presented, the Tribunal is satisfied that VR Intelligence was responsible for the fraudulent conduct. The Tribunal accepts that at the time bogus documents were provided to the Department, the applicant had no knowledge of and was not complicit in creating or providing those documents.
42. The Tribunal is satisfied that the applicant did not instruct VR Intelligence to submit bogus documents to the Department. He had no reason to do so. He had no reason to claim points

⁶For example, in *Singh v MIBP* [2015] FCCA 2776, the Court found at [56] that 'it is consistent with the conclusions of Buchanan J in *Trivedi* that the provisions of s 98 of the Act should apply to PIC 4020 and that an applicant should be deemed to have completed an application form where he or she causes a form to be filled out or his/her behalf'

for completion of a professional year with the Australian Technical & Management College in September 2018. At that time the applicant was completing his Master of Business Administration at Holmes Institute.

43. Similarly, in May 2019, the applicant obtained a skills assessment letter from CPA Australia for his nominated occupation based on completion of a Master of Commerce (Professional Accounting) from Federation University Australia. This qualification was found to be comparable to at least an Australian bachelor's degree and did not require assessment of any work experience he may or may not have completed in Australia or overseas.

44. *Third-party fraud and determination of whether the Tribunal has jurisdiction to exercise*

45. As the Tribunal found that the fraud was committed by VR Intelligence and that the applicant was neither complicit in nor indifferent to whether VR Intelligence engaged in the fraudulent conduct in the visa application process, the Tribunal will now assess how the fraudulent conduct affected the decision-making process.
46. Relying on *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142, the Tribunal notes that the operation of PIC 4020 can be affected by the fraudulent conduct of an agent where the visa applicant was not complicit in that fraud or was not indifferent to whether the agent used unlawful or dishonest means to obtain a visa.
47. *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 is the leading authority on migration fraud by third parties and highlights that due to the broad and varied nature of potential fraudulent dealings, it is undesirable to prescribe in general terms the scope of third-party fraud.
48. The Tribunal is satisfied that, by providing the bogus documents and then failing to notify the applicant that a notice had been issued under s 57 of the Act, VR Intelligence stultified the operation of the natural justice provisions in the Act, which provide the applicant with the opportunity to have his case assessed and to comment on adverse information in accordance with the intention of the Act.
49. Based on the evidence before it, the Tribunal finds that the Department's decision to refuse the applicant's visa on the basis that he failed to satisfy PIC 4020 was stultified by the fraud of VR Intelligence. The fraud committed by VR Intelligence deprived the applicant of accessing the statutory scheme under Division 3 of Part 2 of the Act, both in the sense that his application was not assessed on its merits, and as he was not afforded natural justice under s 57 of the Act. Where fraud stultifies the decision-making process, the application is in law no application at all.⁷ An invalid application cannot be considered.⁸
50. As the Tribunal found that the visa application is not valid, the Tribunal is setting aside the decision made by the Department on 19 September 2022 and substituting it with a new decision pursuant to s 105(c)(i) of the *Administrative Review Tribunal Act 2024* that the visa application was not valid and cannot be considered.
51. The Tribunal is mindful that the applicant will no longer be able to rely on the previously issued invitation to apply for this visa, as the visa application must be lodged within six months from the date of invitation. The applicant may be able to submit a new expression of interest to the Department and if he receives a new invitation to apply, do so within the specified period.

⁷*Maharjan v MIBP* [2017] FCAFC 213 at [102]–[103].

⁸Section 47(3).

DECISION

52. The Tribunal sets aside the decision not to grant the applicant a Skilled Independent (Permanent) visa and substitutes a decision that the applicant's Skilled Independent (Permanent) visa application was invalid.

Date(s) of hearing:

7 November 2024

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the ART during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

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